

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

VIRGINIA VANCE,
Claimant Below, Petitioner

vs.) No. 100638 (BOR Appeal No. 2043808)
(Claim No. 940064671)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Respondent

and

TALON RESOURCES, INC. and
BEE TREE MINING, INC.,
Employers Below, Respondents

FILED

July 15, 2011

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated April 26, 2010, in which the Board affirmed a June 17, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's denial of dependent's benefits on September 27, 2007. The appeal was timely filed by the petitioner, and the Insurance Commissioner filed a response. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, the Court is of the opinion that this case is appropriate for consideration under the Revised Rules. Having considered the parties' submissions and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The Board of Review affirmed the denial of Ms. Vance's dependent's benefits application. Ms. Vance argued that she was entitled to dependent's benefits as her deceased husband's treating physician at the time of his death, Dr. B. P. Rao stated that, to a reasonable degree of medical probability, occupational pneumoconiosis was a significant contributing factor to the decedent's death per *Bradford v. Workers' Comp. Comm'r*, 185 W. Va. 434, 408 S.E.2d 13 (1991). The Office of Judges found that Dr. Rao's testimony lacks credibility, however, due to Dr. Rao's failure to attribute any significant degree of impairment to the decedent's heavy smoking history, which was at least one pack a day for 30 years. Further, Dr. Rao acknowledged that the decedent suffered from significant bronchiectasis, which is a condition for which the decedent was hospitalized repeatedly during the last few years of his life, and no expert has attributed this condition to coal dust exposure.

The Office of Judges instead relied on the Occupational Pneumoconiosis Board's conclusion that, while the decedent had occupational pneumoconiosis, it was present only in a minimal degree and did not contribute to his death in any material way. The doctors agreed that the decedent's death was attributable to smoking, chronic obstructive pulmonary disease, and recurrent infections related to trauma sustained to the decedent's chest wall in an automobile accident. The decision of the Occupational Pneumoconiosis Board is accorded substantial deference. *Fenton Art Glass v. W. Va. Office of the Ins. Comm'r*, 222 W. Va. 420, 431, 664 S.E.2d 761, 772 (2008) (per curiam). The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of April 26, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the denial of the petitioner's request for dependent's benefits is affirmed.

Affirmed.

ISSUED: July 15, 2011

CONCURRED IN BY:

Chief Justice Margaret Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh